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Impeachment Grounds: Part 5: Selected Douglas/Nixon Inquiry Materials

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Summary

This is a collection of selected background materials pertinent to the issue of what constitutes impeachable misconduct for purposes of Article II, section 4 of the United States Constitution quoted below. It includes excerpts from material prepared in connection with the impeachment inquiries involving Justice Douglas and President Nixon. It is the fifth of six segments that together with footnotes comprise, *Impeachment Grounds: A Collection of Selected Materials,* CRS Report 98-882.

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. U.S.Const. Art. II, §4

Douglas Inquiry

Rep. Gerald Ford

"Conduct of Associate Justice Douglas"

" . . .What, then, is an impeachable offense?

"The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office. Again, the historical context and political climate are important; there are few fixed principles among the handful of precedents.

"I think it is fair to come to one conclusion, however, from our history of impeachments: a higher standard is expected of Federal judges than of any other "civil officers" of the United States.

"The President and Vice President, and all persons holding office at the pleasure of the President, can be thrown out of office by the voters at least every 4 years. To remove them in midterm—it has been tried only twice and never done—would indeed require crimes of the magnitude of treason and bribery. Other elective officials, such as Members of the Congress, are so vulnerable to public displeasure that their removal by the complicated impeachment route has not even been tried since 1798. But nine Federal judges, including one Associate Justice of the Supreme Court, have been impeached by this House and tried by the Senate; four were acquitted; four convicted and removed from office; and one resigned during trial and the impeachment was dismissed.

"In the most recent impeachment trial conducted by the other body, that of U.S. Judge Halsted L. Ritter of the southern district of Florida who was removed in 1936, the point of judicial behavior was paramount, since the criminal charges were admittedly thin....

"In a joint statement, Senators Borah, LaFollette, Frazier, and Shipstead said:

"We therefore did not, in passing upon the facts presented to us in the matter of the impeachment proceedings against Judge Halsted L. Ritter, seek to satisfy ourselves as to whether technically a crime or crimes had been committed, or as to whether the acts charged and proved disclosed criminal intent or corrupt motive; we sought only to ascertain from these facts whether he had conducted himself in a way that was calculated to undermine public confidence in the courts and to create a sense of scandal.

"There are a great many things which one must readily admit would be wholly unbecoming, wholly intolerable, in the conduct of a judge, and yet these things might not amount to a crime.

"Senator Elbert Thomas of Utah, citing the Jeffersonian and colonial antecedents of the impeachment process, bluntly declared:

'Tenure during good behavior . . . is in no sense a guaranty of a life job, and misbehavior in the ordinary, dictionary sense of the term will cause it to be cut short on the vote, under special oath, of two-thirds of the Senate, if charges are first brought by the House of Representatives . . . To assume that good behavior means anything but good behavior would be to cast a reflection upon the ability of the fathers to express themselves in understandable language'," 116 *Cong.Rec.* 11912-914 (remarks of Rep. Gerald Ford) (1970).

Special Inquiry Subcommittee

"Both concepts would allow a judge to be impeached for acts which occur in the exercise of judicial office that (1) involve criminal conduct in violation of law, or (2) that involved serious dereliction from public duty, but not necessarily in violation of positive statutory law or forbidden by the common law. Sloth, drunkenness on the bench, or unwarranted and unreasonable impartiality [sic] manifest for a prolonged period are examples of misconduct, not necessarily criminal in nature, that would support impeachment. When such misbehavior occurs in connection with the federal office, actual criminal conduct should not be a requisite to impeachment of a judge or any other federal official. While such conduct need not be criminal, it nonetheless must be sufficiently serious to be offenses against good morals and injurious to the social body.

"Both concepts would allow a judge to be impeached for conduct not connected with the duties and responsibilities of the judicial office which involve criminal acts in violation of law," *Final Report of the Special Subcomm. on H.Res. 920 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970)(comm.print), quoted in 3 DESCHLER'S ch. 14, §3.13.

Nixon Inquiry

Inquiry Staff Report

"Two points emerge from the 400 years of English parliamentary experience with the phrase 'high Crimes and Misdemeanors.' First, the particular allegations of misconduct alleged damage to the state in such forms as misapplication of funds, abuse of official power, neglect of duty, encroachment on Parliament's prerogatives, corruption, and betrayal of trust. Second, the phrase `high Crimes and Misdemeanors' was confined to parliamentary impeachments; it had no roots in the ordinary criminal law, and the particular allegations of misconduct under that heading were not necessarily limited to common law or statutory derelictions of crime.

* * *

"In any event, the interpretation of the `good behavior' clause adopted by the House has not been made clear in any of the judicial impeachment cases. Whichever view is taken, the judicial impeachments have involved an assessment of the conduct of the officer in terms of the constitutional duties of his office. In this respect, the impeachments of judges are consistent with the three impeachments of non-judicial officers.

"Each of the thirteen American impeachments involved charges of misconduct incompatible with the official position of the officeholder. This conduct falls into three broad categories; (1) exceeding the constitutional bounds of the powers of the office in derogation of the powers of another branch of government; (2) behaving in a manner grossly incompatible with the proper function and purpose of the office; and (3) employing the power of the office for an improper purpose or for personal gain.

* * *

"Impeachment is a constitutional remedy addressed to serious offenses against the system of government. The purpose of impeachment under the Constitution is indicated by the limited scope of the remedy (removal from office and possible disqualification from future office) and by the stated grounds for impeachment (treason, bribery and other high crimes and misdemeanors). It is not controlling whether treason and bribery are criminal. More important, they are

constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are `high' offenses in the sense that word was used in English impeachments.

"The framers of our Constitution consciously adopted a particular phrase from the English practice to help define the constitutional grounds for removal. The content of the phrase `high Crimes and Misdemeanors' for the framers is to be related to what the framers knew, on the whole, about the English practice—the broad sweep of English constitutional history and the vital role impeachment had played in the limitation of royal prerogative and the control of abuses of ministerial and judicial power....

"While it may be argued that some articles of impeachment have charged conduct that constituted crime and thus that criminality is an essential ingredient, or that some have charged conduct that was not criminal and thus that criminality is not essential, the fact remains that in the English practice and in several of the American impeachments the criminality issue was not raised at all. The emphasis has been on the significant effects of the conduct—undermining the integrity of the office, disregard of constitutional duties and oath of office, arrogation of power, abuse of the governmental process, adverse impact on the system of government. Clearly, these effects can be brought about in ways not anticipated by the criminal law. Criminal standards and criminal courts were established to control individual conduct. Impeachment was evolved by parliament to cope with both the inadequacy of criminal standards and the impotence of courts to deal with the conduct of great public figures. It would be anomalous if the framers having barred criminal sanctions from the impeachment remedy and limited it to removal and possible disqualification from office, intended to restrict the grounds for impeachment to conduct that was criminal. . . .

"It is useful to note three major presidential duties of broad scope that are explicitly recited in the Constitution: `to take Care that the Laws be faithfully executed,' to `faithfully execute the Office of President of the United States' and to `preserve, protect, and defend the Constitution of the United States' to the best of his ability. The first is directly imposed by the Constitution; the second and third are included in the constitutionally prescribed oath that the President is required to take before he enters upon the execution of his office and are, therefore, also expressly imposed by the Constitution. . . .

"Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality. In deciding whether this further requirement has been met, the facts must be considered as a whole in the context of the office, not in terms of separate or isolated events. Because impeachment of a President is a grave step for the nation, it is to be predicated only on conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the presidential office," *Impeachment Inquiry Staff Report: Constitutional Grounds for Presidential Impeachment*, House Comm. on the Judiciary, 93d Cong., 2d Sess. 7, 17-8, 26-7 (1974).

Attorneys for President Nixon

"The English impeachment precedents clearly demonstrate the criminal nature and origin of the impeachment process. The Framers adopted the general criminal meaning and language of those impeachments while rejecting the 17th century aberration where impeachment was used as a weapon by Parliament to gain political supremacy at the expense of the rule of law. In light of legislative and judicial usage, American case law, and established rules of constitutional and statutory construction, the term `other high Crimes and Misdemeanors' means great crimes against the state. Finally, a review of American impeachment precedents shows that while judges may be impeached for something less than indictable offenses—even here the standard is less

than conclusive—all the evidence points to the fact that the President may not. He may be impeached only for indictable crimes clearly set forth in the Constitution. This is the lesson of history, logic, and experience; this is the meaning of `Treason, Bribery, and other high crimes and Misdemeanors.'

"Any analysis that broadly construes the power to impeach and convict can be reached only by reading Constitutional authorities selectively, by lifting specific historical precedents out of their precise historical context, by disregarding the plain meaning and accepted definition of technical, legal terms—in short, by placing a subjective gloss on the history of impeachment that results in permitting the Congress to do whatever it deems most politic. The intent of the Framers, who witnessed episode after episode of outrageous abuse of the impeachment power by the self-righteous English Parliament, was to restrict the political reach of the impeachment power.

"Those who seek to broaden the impeachment power invite the use of power `as a means of crushing political adversaries or ejecting them from office.' 1 A. De Tocqueville, *Democracy in America* 11-115 (P. Bradley ed., 1945). The acceptance of such an invitation would be destructive to our system of government, and to the fundamental principle of separation of powers inherent in the very structure of the Constitution. The Framers never intended that the impeachment clause serve to dominate or destroy the executive branch of government. In their wisdom, they provided adequate and proper methods for change. The misuse of the impeachment clause was not one of them," *An Analysis of the Constitutional Standard for Presidential Impeachment,* 59-61 (1974).

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